

Attorney Docket No.: J6699/1(C)  
Serial No.: 10/050,238  
Filed: January 16, 2002  
Confirmation No.: 6809

### **REMARKS**

By this Amendment, applicants have deleted claim 4, which does not appear required in view of previous amendments to claim 22. Accordingly, claims still pending are claims 3-7, 9-13 and 19-23.

The fundamental point of disagreement, however, seems to be related to U.S. Patent No. 6,080,708 to Glenn, Jr. et al. ("Glenn"). Specifically, while apparently conceding that the trihydroxystearin oil structurant to which applicants have limited the claim is not disclosed in the oil phase of Glenn, but is disclosed only in aqueous phase (see page 8, lines 14-15 of "Response to Applicants' Arguments"), the Examiner maintains that "a reference is not limited to preferred embodiment" and seems to imply that it would have been obvious to use the trihydroxystearin in the oil phase.

In this regard, applicants first note that the general standard for obviousness, as has been recently interpreted by the Courts, is whether it would have been "unpredictable" to use a particular component in combination with another. Further, one important factor in determining unpredictability is whether there has been a direct teaching away from making such a combination. In this regard, applicants respectfully submit that the Declaration of Mike Aronson mailed on February 1, 2005 together with the response to the November 4, 2004 Office Action (and to which applicants have previously referred) clearly addresses the issues about which the Examiner is concerned.

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Specifically:

- 1) Initially, the Declaration points out that the "category" to which the trihydroxystearin of Glenn belongs, as used in the Glenn reference, is that of a stabilizer. This is clear from the description of Glenn at column 4 of the specification and from the process description at page 17 ("Single Vessel Process") where the trihydroxystearin is blended into the aqueous phase as such stabilizer (see paragraph 7 of the declaration);
- 2) From paragraph 10 of the declaration and citation, it is clear that a "stabilizer" is intended to form a network that prevents oil or lipid from coalescing;
- 3) If one wanted to enhance deposition of an oil, a stabilizer is exactly opposite to what one would want to add since one would want the oil or lipid to deposit. Thus, Glenn teaches directly away from use of trihydroxystearin (taught as "stabilizer") in oil phase since one of ordinary skill would believe the stabilizer would decrease deposition of oil rather than increase it;
- 4) Contrary to what would have been expected, however, when applicants prepared an emulsion and added this "believed stabilizer" to the oil phase (paragraph 12 of the declaration), photomicrographs demonstrated that a

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network of crystal formed and droplets were non-spherical. This emulsion was seen to readily floc and destabilize the emulsion;

- 5) Thus, quite unpredictably, rather than have a stable composition with no crystalline network (as was seen when trihydroxystearin was used in water and suggested that the trihydroxystearin was a stabilizing component), it was found that, when used in oil phase, it caused destabilization and, associated with this destabilization, enhanced oil deposition (see paragraph 13 of the declaration).

In short, it is believed that the Declaration clearly shows that (1) trihydroxystearin would be expected to stabilize compositions; (2) this would result in no enhancement in deposition; (3) unpredictably, when used in oil phase, the trihydroxystearin was seen to act as a destabilizer, and (4) this was observed to result in unexpected enhancement in deposition.

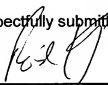
That is, to the extent that a showing is needed to rebut potential obviousness, this Declaration provided exactly such showing.

It is believed that all the other objections fall when Glenn falls as a primary reference. In this regard, it is respectfully requested that the Examiner withdraw all rejections based on Glenn alone or based on combination of Glenn with other references and it is further respectfully requested that claims, as amended, i.e., claims 5-7, 9-13 and 19-23, be allowed.

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If a telephone conversation would be of assistance in advancing prosecution of the subject application, applicants' undersigned agent invites the Examiner to telephone him at the number provided.

Respectfully submitted,



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